

STATE OF MICHIGAN
COURT OF APPEALS

GWINIOV J. RILEY,

Plaintiff-Appellant,

v

STATE FARM FIRE AND CASUALTY CO.,

Defendant-Appellee,

and

ENVIRONMENTAL HEALTH RESOURCES,
SERVPRO OF MUSKEGON, and RANDALL C.
MULDER,

Defendants.

UNPUBLISHED

September 25, 2008

No. 276195

Muskegon Circuit Court

LC No. 2003-042817-CZ

Before: Meter, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiff appeals, as of right, a judgment in her favor in the amount of \$33,523.49 in this breach of contract action. Specifically, plaintiff appeals the trial court's determination that defendant, State Farm Fire and Casualty Co. ("State Farm"), was entitled to a setoff from the jury award of amounts it previously paid on insurance claims submitted to it by plaintiff and the court's entry of a judgment applying the offsets. Because State Farm was not entitled to such setoffs, we remand for entry of a judgment in plaintiff's favor in the amount of \$125,450, plus case evaluation sanctions.

In January of 2001, plaintiff filed a claim with her homeowner's insurance provider, State Farm, for damages to her home resulting from ice damming. State Farm paid on the claim. In April 2002, plaintiff filed another insurance claim with State Farm for damages resulting from a toilet leak in her home. The toilet leaked into plaintiff's basement, causing damage to items in the basement and visible mold to grow in the bathroom and on the basement ceiling. Due to the presence of mold and plaintiff's complaints of physical ailments, State Farm's agent determined that it would be best if plaintiff's family vacated the home.

State Farm undisputedly paid for air quality testing on plaintiff's home and mold remediation, as well as the cleaning of some of the contents of the home, repair of the home, and additional living expenses ("ALE") for plaintiff's family to reside outside of the home while the home was tested and remediation took place. Despite the fact that the home passed clearance testing in August 2002, plaintiff still suffered physical ailments upon entering the home and mold was apparently still present in the home. State Farm paid for further testing on the home and continued to pay ALE benefits to plaintiff while it tried to determine whether anything further needed to be done concerning the toilet leak claim. In December 2002, State Farm determined that because the home had passed clearance testing and any present mold was not caused by the toilet leak, it would pay nothing further on the toilet leak claim.

Plaintiff thereafter brought suit against State Farm for, among other things, breach of contract. Plaintiff essentially claimed that the mold remediation was unsuccessful and that she continued to suffer damages as a result of the toilet leak. Plaintiff asserted that further payments were thus owed on the toilet leak claim and State Farm refused to pay the additional amounts owing.

The breach of contract claim proceeded to a jury trial, at the conclusion of which the jury rendered a verdict in plaintiff's favor in the amount of \$164,450. In post-trial motions, State Farm requested a setoff from the jury verdict of amounts it had already paid on the claim(s) as well as setoff of a settlement amount between plaintiff and another defendant. The trial court agreed that such setoffs were proper and, after applying the setoffs and awarding interest and prevailing party costs to plaintiff, entered a final judgment in plaintiff's favor in the amount of \$33,523.49.

On appeal, plaintiff asserts that State Farm was not entitled to setoffs of amounts it previously paid on the ice damming and toilet leak claims, as the jury awarded her only those damages that arose after State Farm discontinued paying benefits on her claims. State Farm, on the other hand, essentially argues that the damages award by the jury encompasses the payments State Farm previously paid, thus entitling it to a setoff of such payments.

In general, absent a statutory mandate authorizing a setoff in a particular circumstance, setoff is a matter in equity. See, generally, 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, § 11. On appeal, we review de novo a trial court's decision whether to grant equitable relief. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997); *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). Issues concerning setoff are reviewed de novo. *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249; 660 NW2d 344 (2003).

Both parties focus generally on the instructions given to the jury to support their opposing positions. The jury was instructed that plaintiff had the burden of proving that she and State Farm had a contract, that State Farm breached the contract, that plaintiff suffered damages as a result of the breach, and the damage resulted from the toilet leak of April 2002 or the ice dam claim that preceded it. The trial court instructed:

If you find that State Farm is liable to Gwin Riley for breach of contract, then you must determine the amount of money, if any, to award to Gwin Riley as contract damages. . . . Contract damages are intended to give the party the benefit of the

bargain by awarding her a sum of money that will, to the extent possible, put her in as good a position as she would have been in had the contract been fully performed. The injured party should receive those damages naturally arising from the breach. Gwin Riley cannot receive a greater amount as damages than she could have gained by the full performance of the contract. In this case, the following types of damages are available if you find Gwin Riley to have met her burden of proof: a) The costs of repair or replacement of the property itself. b) The cost of cleaning or replacing contents damaged. c) Additional living expenses.

Notably, the jury was not instructed to determine the total amount of benefits plaintiff was entitled to recover under the contract. Instead, they were directed to award damages that arose by virtue of State Farm's breach. Undisputedly, State Farm did not breach the contract until it ceased paying benefits on plaintiff's claims. The only damages that would arise due to a breach, then, would be those State Farm failed to pay. "The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996). To place plaintiff in as good as a position as she would have been if the contract had been fully performed, the jury must consider and take into account the fact that at least part of the contract had been performed, and determine to what extent the contract had been performed.

As pointed out by State Farm, the trial court also, however, instructed the jury not to consider what State Farm had already paid in assessing what damages plaintiff should be awarded, indicating that the trial court would make any necessary offset. This instruction could be construed as somewhat confusing, as it also directed that the jury could consider the payments in making all other decisions it needed to make and, again, instructed the jury to determine the amount of damages that arose from the breach (the breach being the failure to pay complete benefits). A review of the jury instructions, by themselves, then, does not irrefutably indicate whether the jury intended to include in its award the amounts previously paid by State Farm on plaintiff's claims.

However, a jury verdict is not void for uncertainty if the jury's intent can be clearly deduced by reference to the pleadings, the court's charge, and the entire record. *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976). Here, the jury's intent can clearly be deduced, from a review of the pleadings and record, as intending to compensate plaintiff for only the amount that State Farm failed to pay on her claims.

Plaintiff's complaint specifically stated a breach of contract action against State Farm because "State Farm became obligated to pay and Plaintiffs were entitled to receive compensation for all covered damages resulting from the mold created by the covered loss" and "Notwithstanding its obligation to do so, Defendant State Farm failed to pay the complete benefits owing under the Policy." Clearly, plaintiff was claiming that State Farm breached its contract with her by paying some, but not all, of the benefits she was owed and she was seeking payment only of the benefits it failed to pay.

This request was echoed throughout the trial and the testimony from both parties' witnesses established the understanding that plaintiff was seeking monies over and above what State Farm had already paid. Plaintiff's theory of the case was generally that State Farm was obligated to pay for remediation to her home due to ice damming and a toilet leak that caused mold. Despite the fact that remediation was unsuccessful and she continued to suffer damages from these events, State Farm declined to continue paying benefits for the losses. Defendant's theory of the case was that the remediation was successful and that they paid everything that was owed to cover the losses. State Farm's agent, Vickie Heck, testified that this was State Farm's position and defense counsel indicated several times in closing argument that State Farm paid everything that it owed to plaintiff. The actual amounts previously paid out by State Farm on the losses was also testified to several times throughout the trial and appeared in exhibits admitted at trial. State Farm further indicated in its appellate briefs that plaintiff's argument was consistently that she was not paid enough under the contract.

There was never a dispute that plaintiff was entitled to recover benefits under the insurance policy and neither party quarreled over the amounts already paid. The payments already made were a non-issue and make an appearance at trial only in support of defendant's contention that it honored its contract and already paid everything it owed to plaintiff. There was never an assertion that State Farm denied her claim outright or that it refused to pay anything under the policy, i.e. that she received nothing. What plaintiff attempted to prove was that she should have gotten *additional* benefits because the losses continued and were never adequately resolved. The pleadings and testimony at trial, then, support plaintiff's position that the jury's award was not intended to encompass amounts already paid by State Farm.

The jury's intent can also be gleaned from the amount of the award. For example, State Farm previously paid plaintiff over \$46,000 in ALE benefits. This evidence was testified to and presented as an exhibit at trial. Neither party disputed that plaintiff received these benefits or that she was entitled to them and State Farm never claimed that it had overpaid the ALE benefits. Instead, it claimed that they had paid every penny of ALE plaintiff was entitled to receive. If the jury had intended to award plaintiff the entire amount she was entitled to under full performance of the contract, inclusive of the amounts State Farm had already paid, it would not have awarded her only \$15,540 in ALE benefits—the \$46,000 already paid would have also been reflected in the award.

Based on the above, State Farm is not entitled to a setoff of the payments it previously paid to plaintiff on her losses. As such, the majority of plaintiff's remaining arguments on appeal (whether the setoff amounts were appropriately calculated) are moot. The only additional argument requiring attention is whether, as a result of our determination regarding setoffs, plaintiff is entitled to case evaluation sanctions.

Case evaluation resulted in a \$50,000 award in favor of plaintiff as against State Farm. Plaintiff accepted and State Farm rejected this award. Plaintiff's net award after a setoff of the \$39,000 settlement amount paid by Servpro (this amount is not contested on appeal) is \$125,450. This verdict being more favorable to plaintiff, as the accepting party, than defendant, the rejecting party, defendant "must" pay plaintiff's actual costs as set forth in MCR 2.403.

Remanded to the trial court for entry of a judgment in plaintiff's favor in the amount of \$125,450, plus actual costs, which are to be determined by the trial court. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Deborah A. Servitto